UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC, d/b/a/ HAWAII TRIBUNE-HERALD	Cases	37-CA-7043 37-CA-7045 37-CA-7046
and		37-CA-7047 37-CA-7048
HAWAII NEWSPAPER GUILD LOCAL 39117, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO		37-CA-7044 37-CA-7045 37-CA-7046 37-CA-7047 37-CA-7042 37-CA-7044 37-CA-7045 37-CA-7046

In Response to the NLRB's March 2, 2011 Notice and Invitation to File Briefs

BRIEF OF THE NATIONAL SMALL BUSINESS ASSOCIATION (NSBA) AS *AMICUS CURIAE*

KEITH A. ASHMUS
MICHAEL J. FRANTZ
EMILY FIFTAL
INNA ANDRIANOV

FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114
(216) 515-1660
Counsel for the National Small Business Association

TABLE OF AUTHORITIES

National Labor Relations Board Cases

Federal Court Cases

Statutes

Other Authorities

ISSUES TO BE ADDRESSED

1. What is the definition and scope of "witness statements" and other information that is protected from disclosure under the Board's decision in *Anheuser-Busch*?

2. If the information requested does not qualify as a protected witness statement under *Anheuser Busch*, what analysis should the National Labor Relations Board conduct regarding the applicability of the work product doctrine?[1]

STATEMENT OF INTEREST

The National Small Business Association ("NSBA") is the nation's oldest national small business advocacy association. With thousands of organizational and small business members in all fifty states and the District of Columbia, the NSBA addresses the small business community's primary public policy concerns on a nonpartisan basis. Because maintaining the confidentiality of employers' internal investigations into employee misconduct is of great economic importance to small businesses, the NSBA has a significant interest in the issues now before the National Labor Relations Board.

The interests of the NSBA encompass the vast majority of employers in the United States. Small businesses with fewer than 500 employees represent 99.7 percent of all U.S. employer firms. They employ about half of all U.S. private sector employees and pay 44% of the total U.S. private payroll. Such small firms have generated 65% of net new jobs over the past 17 years in this

[1] The Board indicated in its clarified March 23, 2011 briefing invitation announcement that it is not seeking to overturn *Anheuser-Busch Inc.*, 237 NLRB 982 (1978). Though the National Small Business Association believes that it is imperative to the interests of the small business community that *Anheuser-Busch* remain controlling law, that issue now appears to be beyond the scope of the *amicus* briefing invited by the Board, and it will not be addressed herein.

country, and they create more than half of the U.S. economy's nonfarm private gross domestic product (GDP). *FAQs: Frequently Asked Questions*, Advocacy *Small Business Statistics and Research*, U.S. SMALL BUSINESS ADMINISTRATION, Office of Advocacy, September 2010, http://archive.sba.gov/advo/stats/sbfaq.pdf.

INTRODUCTION

The NSBA asserts that it would be inappropriate and harmful for the Board to undermine the rule established in *Anheuser-Busch Inc.*, 237 NLRB 982 (1978), by unduly narrowing the scope of witness statements protected from disclosure under that decision. In this Brief, the NSBA will first discuss the long-recognized, important policy reasons for protecting a broad range of witness statement information, including employer notes, summaries, and other information that reveals the substance of witness testimony. Because strong confidentiality concerns are inherent to *all* internal employer investigations into employee misconduct – and are especially critical to small employers – the NSBA advocates that case-by-case balancing is not an appropriate standard for evaluating whether witness information should be protected on confidentiality grounds. The NSBA contends that *Anheuser-Busch*'s bright-line non-disclosure rule should apply to the full range of substantive witness information collected by employers during internal investigations. The NSBA urges the Board not to limit the definition of "witness statements" protected by *Anheuser-Busch* by requiring employers to provide specific assurances of confidentiality. Finally, the NSBA asserts that witness statements and other witness information will and should virtually always be protected from disclosure under the work product doctrine.

ARGUMENT

I. Witness statements and substantive witness information must be protected from disclosure under a bright-line rule because this information raises unique issues of witness intimidation, chilling of participation, and interference with investigation integrity.

The *Anheuser-Busch* decision was expressly grounded in the understanding that the disclosure of witness statements must be limited because such disclosure implicates critical considerations that do not apply to other types of information that employers must provide to unions. 237 NLRB at 984. These considerations include: exposure of participating witnesses to intimidation, coercion, or harassment; the chilling effect on witness participation in the employer's internal investigations; and a decrease in the quality of employer investigations. As these concerns apply with equal force both to formal statements and to any information that reveals the substance of a witness's statement, including an employer's interview notes or summaries of witness reports, all such information must be protected under a bright-line non-disclosure rule.

A. Premature disclosure of substantive witness information exposes witnesses to the risk of intimidation, coercion, retaliation, and harassment.

The Supreme Court has long recognized the dangers of releasing witness statements. In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Court held that, prior to the hearing on an unfair labor practice charge, the Board was not required under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to disclose to employers or unions the investigatory statements of witnesses whom the Board intended to call at the hearing. The Supreme Court cited several important risks to the Board's ongoing investigation that would result from such disclosure, including the "most obvious risk" of coercion and intimidation of employees who provide

statements, as well as the reluctance of witnesses to participate in Board investigations and to give candid statements. *Id.* at 239.

Importantly, the Court emphasized that witnesses are especially likely to be inhibited by fear of reprisal and harassment due to the unique character of labor litigation. *Id.* at 240; *see also Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1107 fn. 15 (1991) (noting that the potential for witness harassment distinguishes investigations of employee misconduct from investigations of workplace accidents, and holding that requiring the employer to reveal identities of employee informants and information they provided about employee drug use could chill the employer's further investigation and could expose informants to harassment); *Northern Indiana Public Service Co.*, 347 NLRB 210, 212 (2006) (explaining that participation in an investigation, as a complainant or witness, may subject employees to intimidation or harassment).

There is no reason to treat witness statements made to employers differently from the statements given to the Board in *Robbins Tire*, and, indeed, concerns about coercion apply with even *greater* force to witness information obtained in employer investigations. Labor-management relations are often adversarial by nature. Unions exert contractual authority and leverage over members, and concepts of union "solidarity" and "brotherhood" embolden members to exert both subtle and overt pressure on other members. Because an employer's investigation is likely still to be in progress when a witness statement is taken – or the employer's disciplinary decision may be subject to further negotiation through the grievance process – the union or other employees may have heightened incentives to exert influence over a witness. In the context of a formal Board hearing, the participation and oversight by an official government

agency – the NLRB – may help deter coercion, but this deterring factor is not present in day-to-day employer investigations.

Further, the threat of negative consequences for participants in employer investigations will exist when *any* information about the substance of an employee's statement is disclosed, such as employer notes or summaries regarding the general nature of a witness's statement, or even the mere indication of whether a witness's statement is "for" or "against" the accused. *Boyertown Packaging Corp.*, 303 NLRB 441, 444-445 (1991). Even revealing which "side" a witness has taken may subject the witness to intimidation or coercion during an ongoing investigation. *Id.* Indeed, generalized statements regarding a witness's position may prompt a greater risk of coercion as others fear that the witness's statement may be more damaging than it actually is.

These concerns are all the more salient for small business employers. Employees who work in close proximity with a small cadre of coworkers may have closer relationships and may be more likely to exert influence over witnesses. It is more difficult for small businesses to separate employees when there are problems or to separate witnesses while an investigation is pending. The popular option among large employers of suspending employees and sending them home "pending investigation" simply may not be feasible.

B. Disclosure of substantive witness information to unions has a chilling effect on internal employer investigations by deterring employees from participating and decreasing the quality of investigations.

As recognized in *Robbins Tire*, mandating that employers provide unions with witness statements, interview notes, or the general substance of witness testimony collected during the employers' internal investigations would chill internal investigations and reduce their quality by

making employees reluctant to come forward with information that may be detrimental to their co-workers. 437 U.S. at 240-241. The Court in *Robbins Tire* made clear that the protection of witness statements from disclosure is key to maintaining the integrity of the Board's own investigations. *Id.* The Board confirmed in *Anheuser-Busch* and its progeny that the same concerns apply equally to employer investigations. *Anheuser-Busch*, 237 NLRB at 984; *see also Northern Indiana Public Service*, 347 NLRB at 212.

Full and honest participation in internal investigations is especially critical to employers because such investigations are essential to maintain workplace safety, to immediately identify and address workplace violence, bullying, sexual and other harassment, ethics violations, and whistleblower complaints, as well as to ensure legal compliance in other areas. *See Northern Indiana Public Service,* 347 NLRB at 212, *citing IBM Corp.*, 341 NLRB 1288, 1291-1294 (2004). Recognizing the importance of facilitating complete employer investigations, the Board in *Northern Indiana Public Service* emphasized that without the ability to conduct such investigations, "an employer would be handicapped in protecting its employees from harm by verifying and correcting workplace misconduct. Similarly, it would be hindered in defending itself against allegations of employer misconduct or vicarious liability for an employee's misconduct." 347 NLRB at 212. The Board specifically noted that, in that case, both of the employees whose interview content was withheld testified that they *would have provided less information* had there been no assurances of confidentiality. *Id.* This is likely a very widespread attitude.

Maintaining the integrity of investigations is of even greater import for small businesses, which overwhelmingly rely on witness statements and/or interviews as their primary internal

investigation tools. Unlike larger organizations, small businesses lack access to other useful investigation methods and resources such as surveillance equipment, sophisticated monitoring processes and technology, and large supervisory forces. Small employers do not have the luxury of employing internal investigative departments, professional outside investigators, or sophisticated law firms. As a result, small employers are even more likely to depend on whatever witness information they can obtain. This is generally the small employer's sole tool for exploring employee wrongdoing and investigating legal compliance issues.

C. Employers should be expected to share with the union only the names of all persons who witnessed or were involved in the investigated incident, which is sufficient for the union to fulfill its duty of fair representation.

Providing a union with a list of names of employees who were involved in or who witnessed an incident is fundamentally different from disclosing their statements or related substantive information about their statements. Sharing only the names of all such persons with the union implicates the concerns of harassment, retaliation, reprisal, and participation deterrence to a much lesser degree than the disclosure of substantive information provided by witnesses. In *Boyertown Packaging*, 303 NLRB 441, an employee was terminated due to inattention while driving a lift truck. The employer provided the union with the names of all 11 employees it interviewed, but it refused to (1) identify which of these 11 witnesses complained, (2) to provide any statements, or (3) to share the substance of their allegations. The Board affirmed the rulings, findings, and conclusions of the administrative law judge (ALJ), who aptly explained:

> Revealing the names of only those who gave evidence damaging to [the grievant] is little different from delivering the statements of identified witnesses because the employer would, by naming those who complained, in fact make a statement on their behalf in their names. Moreover, the singling out of witnesses adverse

> to a grievance spotlights them as opponents to the grievants' cause and, by so doing, unnecessarily enhances the possibility they may be subject to coercion or intimidation in an effort to persuade them to change or retract their oral reports previously given to the employer. It is precisely this possibility of coercion and intimidation of witnesses that the Board's decision in *Anheuser-Busch* was designed to prevent, and I perceive no logical reason why that same policy of preventing coercion and intimidation of witnesses should not apply to requests limited to the names of employee witnesses who complained.

Id. at 444-445. Indeed, the ALJ and the Board in *Boyertown Packaging* recognized that witness statements and other substantive information, such as the names of witnesses holding a particular viewpoint, must be withheld from unions because this information implicates key interests of employers in conducting internal investigations. Thus, *Boyertown Packaging* gave information revealing the substance of employee statements the same protection that it did to the statements themselves.

Providing the union with the identities of *all* persons involved enables the union to conduct its own investigation and to fulfill its duty of fair representation. These names are the same starting point from which the employer must launch its investigation, and providing the union with witness names puts the union on the same footing as the employer.

II. Case-by-case balancing should not be applied to determine whether substantive information about witness statements is protected, because the same confidentiality concerns are universal to *all* substantive witness information in *every* internal investigation.

The strongest basis for withholding investigatory witness statements, notes, and summaries from the union is the employer's inherent need to maintain the confidentiality of its internal investigations to the greatest extent possible. Where information at issue was not considered protected under *Anheuser-Busch*, the Board has applied a case-by-case balancing test

to determine whether information should be withheld from disclosure to the union on confidentiality grounds. *Northern Indiana Public Service*, 347 NLRB 210, 211 (2006) (confidentiality interest outweighed union's need for witness interview notes); *Pennsylvania Power*, 301 NLRB at 1105 (employer had a confidentiality interest in the identity of employee informants and the information they provided regarding employee drug use); *Detroit Edison Co.* v. NLRB, 440 U.S. 301 (1979) (employer did not violate statutory duty when it refused to disclose confidential information about employee aptitude tests);

However, case-by-case analysis of confidentiality is not appropriate when examining the employer's duty to disclose witness statements, notes, and summaries collected during internal investigations of employee misconduct. Maintaining confidentiality of these materials in *all* internal investigations is critical to ensure the integrity of these investigations. *See Northern Indiana Public Service*, 347 NLRB at 212 (recognizing that treating interview notes as confidential serves many important purposes). A comprehensive, bright-line rule protecting the substance of witness information from outside disclosure, as applied in *Anheuser-Busch,* enables employees to provide statements with the comforting knowledge that the information they reveal will not be extracted involuntarily from employers, at least before actual testimony must be given.

Lack of clarity as to confidentiality is likely to impede investigations and to deter the reporting of incidents of misconduct, especially those involving workplace harassment, violence, or other serious threats to workplace safety. *See Id.* at 212, *citing Pennsylvania Power*, 301 NLRB at 1107. Even a mere subjective belief that participation may result in negative perceptions by their co-workers or union is enough to deter employees from complete and candid participation.

See Robbins Tire, 437 U.S. at 240-241 (reluctance to participate in an investigation or to give statements may flow less from a witness's desire to maintain complete confidentiality than from an all too familiar unwillingness to "get too involved" unless absolutely necessary). Hence, it is often not the specific substantive content of the witness statements (or interview notes or testimony summaries) that necessarily makes them confidential, but the centrality of confidentiality to *all* internal investigations of employee misconduct. *See Northern Indiana Public Service*, 347 NLRB at 214.

Without a bright-line rule, employers will act at their peril in conducting investigations, especially when choosing to conduct an investigation without an attorney involved. Should a balancing test be applied, employers will not be able to predict whether certain materials would or would not be protected from disclosure, further hampering the employer's ability to take notes and develop investigative material – in other words, to conduct a full and thorough investigation.

Again, this is especially true for small businesses. With their limited workforces, they must be able to count on confidentiality in internal investigations in order to encourage employees to participate in sensitive investigations into the misconduct of co-workers, with whom they often work in close proximity. Facilitating thorough and complete investigations of serious misconduct, making employees as comfortable as possible with participating in investigations, assuring confidentiality, and protecting a limited workforce from negative consequences is integral to the very survival of small businesses. A bright-line rule will permit small employers to engage in thorough, fully documented investigations with confidence that their witness information will remain confidential.

To facilitate employee investigations and enable employers to protect participants, the Board should apply a bright-line rule recognizing that confidentiality is integral in *all employer investigations.* Resorting to case-by-case balancing sends mixed messages to employers and witnesses regarding the protected status of investigatory information. Recognizing that confidentiality is implicated in every internal employer investigation into employee misconduct, and protecting the testimony of witnesses under a clear standard like *Anheuser-Busch,* maintains employers' ability to offer credible assurances of confidentiality, encourages participation in the internal investigatory process, protects participating witnesses from potential negative consequences, and enables employers to effectively address workplace harassment, threats, violence, and other serious issues. *Anheuser-Busch* properly establishes a bright-line, consistent standard of protection that supports the integrity of employer investigations and this standard should not be limited in any way.

III. In analyzing whether a witness statement is protected under *Anheuser-Busch*, the Board should not require employers to provide assurances of confidentiality.

Whether the employer gives express assurances of confidentiality to a particular witness during an investigation should not be a determinative factor in the Board's assessment of whether the statement of that witness is protected from disclosure under *Anheuser-Busch*. As discussed previously, maintaining confidentiality is fundamental to *all internal investigations* into employee misconduct, regardless of whether employers use "magic words" to express their intentions. Confidentiality interests in witness information collected during an internal investigation do not disappear or diminish if the investigating human resources or other company official inadvertently fails to provide assurances to the witness. While specific

assurances of confidentiality may indeed make employees more confident about sharing information with the employer, the lack of such express assurances does not diminish the prospect of intimidation, harassment, or other negative reactions by third parties such as the union and co-workers.

Should the Board require assurances of confidentiality in order for witness statements or related information to qualify for protection, small businesses will be greatly disadvantaged. Because small businesses are far less able to afford preventive legal guidance, they are much more likely to lack sophisticated knowledge of detailed rules and to fall into traps created by "small print" requirements in Board law. Requiring employers to provide specific assurances in order for protection to apply unjustifiably penalizes employers for inadvertent failure to use particular language, and it ignores the universal need for confidentiality in all internal investigations. Requiring assurances opens the door to needless litigation as to whether the assurances given in a particular case were sufficient to qualify the information for protection – *i.e.*, whether the specific words used were sufficient; whether they were documented; whether they utilized appropriate language, etc. *Anheuser-Busch* certainly did not require employers to give assurances of confidentiality, and adopting such a requirement would inappropriately and arbitrarily narrow the clear rule of that case. *Anheuser-Busch*, 237 NLRB at 984-85.

IV. The Board should apply *Anheuser-Busch* protections of employee witness statements to protect the entire array of substantive witness information.

The Board should clarify that *Anheuser-Busch* protection still applies with full force to interview notes, summaries of information provided by witnesses, and other substantive information about the nature of a witness's statement. As explained above, disclosure of such

information implicates the same considerations to the same degree as the disclosure of witness statements themselves. *Boyertown Packaging*, 303 NLRB 441 (affirming the ALJ's decision that the identities of complaining witnesses, as well as summaries of any statements, should be protected from disclosure). As succinctly explained in *Boyertown Packaging,* "It does not seem logical that an employer can be required to furnish identifiable summaries of statements when it is not required to furnish the statements because such a solution runs counter to the Board's concerns with the dangers which it describes in *Anheuser-Busch* . . . ." 303 NLRB at 444 (ALJ). Revealing even just the *names* of employees taking a particular position during the investigation in effect makes a statement about the content of these employees' testimony, which should be protected from disclosure to the union. *Id.* at 444-45.

The very same confidentiality concerns discussed earlier in this Brief are implicated to the same extent in the disclosure of the employer's notes on its interviews with witnesses. *Id.*; *Northern Indiana Public Service*, 347 NLRB 210. Although the Board in *Northern Indiana Public Service* applied a balancing standard for documents other than witness statements, the Board noted that the employer did not raise the argument that interview notes should be protected under *Anheuser-Busch* along with witness statements themselves. *Id.* at 211, n. 9. However, the Board extensively discussed the importance of the employer's confidentiality interests in facilitating participation in internal investigations, maintaining workplace safety, and protecting employees from the retribution, retaliation, intimidation, or the simple discouragement that may result from the actual or feared disclosure of substantive information to third parties. *Id.* at 212-214. The Board also stated that the employer's inability to assure interviewees of confidentiality is

likely to impede investigations into workplace misconduct and to deter the reporting of incidents. *Id.* at 212; *Pennsylvania Power*, 301 NLRB 1104 (upholding the employer's refusal to provide the union with the names of employee informants and the information they provided regarding employee drug use).

The Board has repeatedly recognized these concerns and held that employers are not obligated to provide summaries or the substance of witness statements to the unions, and the Board should confirm that this rule still applies. *Raley's Supermarkets and Drug Centers*, 349 NLRB 26, 27 (2007); *Boyertown Packaging*, 303 NLRB 441; *see also Morgan v. Communication Workers of Am.*, 2009 U.S. Dist. LEXIS 21088, *41-42; 157 Lab. Case. (CCH) P11, 205 (D.N.J. Mar. 17, 2009) (court held notes of witness interviews and witness statements were properly withheld from union under Board precedent). In *Raley's Supermarkets*, the union sought a copy of the employer's investigation report or a summary of its investigatory findings. *Raley's Supermarkets*, 349 NLRB 26. The employer responded that not one of the employees interviewed alleged any improper treatment and that the company considered the matter closed. In addition to allowing the employer to withhold any witness statements and summaries of such statements, the Board also affirmed that the union was not entitled to "the opinions, comments or recommendations of the managers who conducted the investigation." *Id.* at 27. These decisions remain well reasoned, and the Board should clarify that *Anheuser Busch* applies to any revelation of the substance of witness statements.[2]

[2] In *Anheuser-Busch* and *Columbus Products Co.*, 259 NLRB 220 (1981), which both held that witness statements could be withheld from the union, the employer voluntarily chose to provide some of the substance of the witness statements to the union. However, the voluntary provision

A. The employer's failure to provide information about witness testimony to the union does not impede the union's duty of fair representation nor the union's ability to handle grievances or arbitration.

Applying *Anheuser-Busch* to protect interview notes and summaries from disclosure leaves unions with sufficient information to fulfill their duty of fair representation. In responding to union requests for information regarding the employer's internal investigations, an employer has an established duty to furnish to the union, upon request, the names of all witnesses involved in and/or interviewed about the incident at issue. *Transport of New Jersey*, 233 NLRB 694 (1977). This information allows the union to obtain on its own the substantive information that it needs, without compromising the employer's ability to conduct its own investigations and maintain confidentiality.

Toward this end, in *Northern Indiana Public Service*, the Board agreed that the employer's concerns about the negative consequences of disclosure were reasonable and substantial, particularly because the employer had already revealed to the union the names of interviewees who had provided the employer's information. 347 NLRB at 214. The Board confirmed that providing the union with the names of witnesses and interviewees is a sufficient accommodation of the union's representational needs and the employer's confidentiality interest in its internal investigation. *Id.* Indeed, where the union already knows the identity of all the witnesses, as well

---

of such information to the union was not a factor in the *Anheuser-Busch* decision, in which the Board specifically disavowed any reliance on the particular facts of the case in arriving at its holding that witness statements are exempt from disclosure. *Anheuser-Busch*, 237 NLRB at 984-85; *Boyertown Packaging*, 303 NLRB at 444. Although employers may choose to provide substantive information to unions, the disclosure of such information should not be mandated precisely because it raises the same concerns that the Board sought to prevent in *Anheuser-Busch*.

as the substance of the grievant's complaint, it could expect interview notes to provide, at best, only corroboration, denials, or assertions of mitigation regarding what was said. *Id.* Such information does not go to the heart of the grievance, and the union can quickly gather it independently from the witnesses.

These names are the same starting point from which the employer must launch its investigation, and providing the union with names of witnesses puts the union on the same footing. Employees always remain free to speak to the union and to assist in the union's investigation. The union has full access to and influence over its membership. Unions are able to obtain first-hand accounts of information and to communicate directly with the parties involved. Indeed, large unions often have far greater resources than do small employers to engage in investigations. By seeking the employer's investigatory material, unions attempt to shift the union's burden to investigate onto the employer and to unfairly benefit from the employer's efforts – a shift that is especially onerous to small employers with limited resources.

While unions often claim that this solution is inadequate because employees may be reluctant to provide information to the union, it is critical to keep in mind that employers face the very same concern when investigating sensitive matters, and to a greater degree than unions. Employees may be especially reluctant to speak to their employer – who ultimately controls their employment and who may issue termination or discipline – about the misconduct or wrongdoing of their co-workers, and they are naturally hesitant to participate in sensitive internal investigations conducted by employers. Especially in a unionized setting, the employer is viewed

as the "other side." Indeed, both union and employer investigators would be reluctant to reveal the substance of the statements they obtain – and neither should have to do so.

There is no evidence that unions have faced undue burdens or systematic difficulties in obtaining desired first-hand information directly from witnesses. Unions often seek out corroborating testimony, additional witnesses, and first-hand information even if the employer voluntarily opens its investigation files. There is no empirical evidence that, in the 30 years of the *Anheuser-Busch* precedent, unions have been overburdened or are unnecessarily forced to process or arbitrate unmeritorious grievances due to receiving insufficient information from employers. Given the immense interest of employers – and of small employers in particular – in conducting thorough internal investigations and protecting the witnesses involved, employees' decisions to communicate with the union should properly remain between the witnesses and the union, in the context of the relationship that the union has cultivated between the two.

B. Abrogating the definition of "witness statements" and limiting the information protected under *Anheuser-Busch* will unduly burden small businesses in violation of recent federal mandates.

Abrogating the *Anheuser-Busch* precedent by requiring special assurances and by failing to protect related information such as interview notes and summaries from disclosure would not only harm the integrity of employer investigations generally, but would threaten the functioning and effective administration of small businesses in particular. This effect directly contravenes recent federal directives. On January 18, 2011, the President of the United States issued an Executive Order "On Improving Regulation and Regulatory Review," which requires all federal agencies to review federal regulations, consider their costs and benefits, and choose the least

burdensome path. Exec. Order No. 12866, 76 F.R. 3821 (January 18, 2011). Along with this executive order, the President issued a Memorandum on "Regulatory Flexibility, Small Business, and Job Creation," 76 F.R. 3827 (January 18, 2011). This Memorandum strongly reinforces the need for federal agencies to consider ways to reduce regulatory burdens on small businesses. The Memorandum further notes that regulations may often impose disproportionate burdens on small businesses due to differences in size, scale, and resources. It encourages regulatory agencies to explore alternatives that minimize any significant economic impact on small businesses.[3] *Id.*

Any potential limitations of *Anheuser-Busch*, such as requiring employers to provide formulaic assurances of confidentiality in order for investigatory product to qualify for protection, should not be imposed at all and certainly should not be undertaken through "judicial rulemaking," which lacks the safeguards of the administrative rulemaking process. The regulatory rulemaking process under the Administrative Procedure Act (APA), 5 U.S.C. § 501 *et. seq.*, and the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.*, provides significant protections for small businesses by clearly informing interested parties of proposed changes and ensuring that their interests and responses to the proposed changes are considered during the public comment period. The rulemaking process gives small businesses time and notice to pool their resources to assess and

[3] Small businesses with fewer than 20 employees annually spend at least 36% more per employee than larger firms to comply with federal regulations. On a per-employee basis, it costs about $2,830 more for small firms to comply with federal regulations than their larger counterparts with 500 or more employees. Nicole V. Crain and Mark Crain, *The Impact of Regulatory Costs on Small Firms*, SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, pg. iv, Sept. 10, 2010, http://www.sba.gov/sites/default/files/The_Impact_of%20_Regulatory_Costs_of_Small%20Firms.pdf.

address the issue at hand, as well as to consult with industry groups in order to assert their interests. As a result, the interests of small businesses in particular mandate that the present case-centric forum should not be used to impose any potential abrogation of *Anheuser-Busch*.

V. In the alternative, witness information will almost always remain privileged from disclosure to the union under the work product doctrine.

As a threshold matter, the NSBA asserts that, due to the unique nature of labor-related employer investigations, a bright-line rule of protection should apply to all investigative material that reveals the substance of witness statements. Application of a predictable, bright-line rule is proper and sufficient, without resort to work product analysis.

In particular, resorting to an analysis of the work product doctrine will harm small businesses, which often do not have the resources to involve attorneys in internal investigations – even if they reasonably anticipate litigation and conduct their investigations in order to prepare for that eventuality. Forcing small businesses to retain counsel in order to obtain protection would create an unnecessary and unfair burden. Further, large unions may have far greater resources to retain counsel than do small employers – and many unions have counsel on staff – and focusing on the involvement of counsel will often burden small employers, but not their union opponents.

Work product protection was extended to documents prepared in anticipation of litigation by a party's representative or agent, regardless of whether that individual was an attorney. FED. R. CIV. P. 26(b)(3), Advisory Committee Notes (1970 Amendment). It is important to remember that non-attorneys, including unions and corporate representatives, are permitted to appear and practice before the Board and during the union grievance process. Accordingly, the bright-line

protection of information generated by non-attorney agents in employer internal investigations, including those that are not directed by attorneys, is appropriate and consistent with Board practice.[4]

However, should the Board choose not to apply a bright-line rule to all substantive investigative material, and therefore resort to application of the work product doctrine, the essential question that the Board should consider in determining whether work product protection applies is whether, in light of the nature of the document and the factual situation in the case, the document can fairly be said to have been prepared or obtained *because of* the prospect of anticipated litigation. *Sprint Communications d/b/a Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004) (citing cases). Because of the nature of labor-management disputes, the protection will apply in virtually all cases. It is well understood that unions often feel forced to pursue even non-meritorious complaints in order to meet their duty of fair representation. Frankly put, any discharge in a union shop is likely to result in a grievance, and, if not settled, in a potential arbitration. Unions are very likely to utilize the grievance process even when the employer's grounds for discipline are clear on their face in order to ensure – and to demonstrate to their members – that they are fulfilling their duty of fair representation.

Case law confirms that, in order for privilege to apply, a party representative "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *Id.* at 989, *quoting In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

---

[4] Due to the fact that non-attorneys may appear before the Board, the Board should consider adopting, through appropriate rulemaking, a rule by which all litigation-related work product, of even non-attorney party representatives, is protected from disclosure.

However, the prospect of litigation need not be actual or imminent; it need only be "fairly foreseeable." *Id., citing Coastal States Gas. Corp. v. Dep't. of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980). It is not necessary for a specific claim to have been contemplated, threatened, or filed at the time of the document's creation. *Id.* at 989, *citing Schiller v. NLRB,* 964 F.2d 1205, 1208 (D.C. Cir. 1992). In labor-management relations in particular, the threat of litigation – in the form of a grievance, arbitration, or lawsuit – is virtually always foreseeable if discipline is contemplated. *See Central Telephone*, 343 NLRB at 989 (noting that in the world of labor relations, the discharge of four union officers for actions taken in their capacity as union officials would likely (albeit not inevitably) result in the union's pursuing arbitration or filing an unfair labor practice charge).

Work product protection should attach regardless of whether the employer has decided on a particular disciplinary action or response to the investigated misconduct, and regardless of whether any grievances or claims have been filed. "It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur." *Id.* at 990, *quoting In re Sealed Case*, 146 F.3d at 886.

The work product protections described in *Central Telephone* apply with equal force to statements and related information collected from employees in *Stephens Media.* The statement of employee Koryn Nako was prepared at the direction of legal counsel in anticipation of litigation. *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63, *119 (2011). The ALJ incorrectly decided that work product privilege did not apply to the statement because litigation was not foreseeable when it was created as (1) the employer had not made any decisions

regarding discipline and (2) the union did not possess the information necessary to decide whether to pursue a grievance. *Id.*

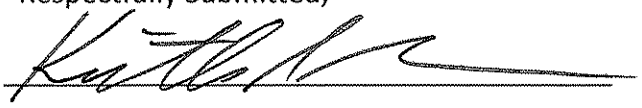
The ALJ's conclusion is clearly erroneous because the relevant inquiry is whether the *employer's* anticipation of potential litigation would be considered reasonable at the time, and not whether the employer has decided on a particular disciplinary action or whether the union has initiated any claims. In *Stephens Media*, the misconduct being investigated involved many activities that possibly implicated the National Labor Relations Act, including the enforcement of the company's security policy against the union, questioning of employees about their connection to a union official, display of union emblems, and policies regarding secret recording of protected activities. Any employer would have had every reason to believe, even before making a final disciplinary decision, that grievances and/or unfair labor practice charges would be filed – hence, litigation was foreseeable.

CONCLUSION

The Board should recognize that confidentiality is implicated in all witness statements, interview notes, and summaries, and it should adhere to *Anheuser-Busch*'s clear, bright-line standard and protect all such information from disclosure to unions. Because confidentiality is universally central to all employer internal investigation of employee misconduct, case-by-case balancing of confidentiality interests is inappropriate and unnecessary. Likewise, the Board should not require employers to give specific assurances of confidentiality in order for information to qualify for protection.

This approach supports employers' – and especially small employers' – critical need to conduct thorough internal investigations into employee misconduct, to encourage witnesses to participate in investigations, and to safeguard them against intimidation, retaliation, or harassment by the union or co-workers. It also prevents unjustified regulatory burdens on small business employers, for whom witness statements and interviews are the primary investigation tools. Finally, substantive information regarding witness statements is likely protected by the work product doctrine, which should not require either the retention of outside counsel, the issuance of discipline, the filing of a grievance, or the existence of actual claims, as long as the possibility of litigation is reasonably foreseeable.

Respectfully Submitted,



Keith A. Ashmus
Michael J. Frantz
Emily Fiftal
Inna Andrianov

FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114
(216) 515-1660

Counsel for the National Small Business Association

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2011, a copy of the foregoing was served via e-mail (where available) and regular mail upon the parties listed below.

L. Michael Zinser, Esq.
The Zinser Law Firm, P.C.
Bank of America Plaza
414 Union Street, Suite 1200
Nashville, TN 37219
mzinser@zinserlaw.com

Counsel for Respondent

Matthew Hall, Esq.
King, Nakamura & Chun-Hoon
Central Pacific Plaza, Suite 98
320 South King Street,
Honolulu, HI 96813.

Counsel for the Charging Party

NLRB Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
NLRBRegion20@nlrb.gov

NLRB Subregion 37
300 Ala Moana Boulevard, Room 7-245
Honolulu, HI 96850
NLRBSubregion37@nlrb.gov

One of the Attorneys for the National Small Business Association